INDEX

Page

Opinions below 1

Jurisdiction 1

Questions presented 2

Statutes involved 2

Statement 3

Argument 6

Conclusion 12

CITATIONS

Cases:

Aberdeen & Rockfish R. Co. v. *SCRAP*, 422 U.S. 289 ..... 7, 8

B. F. Goodrich Co. v. *Northwest Industries, Inc.*, 424 F.2d 1349, certiorari denied, 400 U.S. 822 8

Contracts for Protective Services, 246 I.C.C. 145 10

Contracts for Protective Services, 318 I.C.C. 111 ..... 3, 4

Contracts-PFE, 340 I.C.C. 754 ..... 4, 5, 9

Interstate Commerce Commission v. *Oregon-Washington R. Co.*, 288 U.S. 14 11

Lawn v. *United States*, 355 U.S. 339 6

St. Joe Paper Co. v. *Atlantic Coast Line R. Co.*, 347 U.S. 298 11

Tampa Phosphate R. Co. v. *Seaboard Coast Line R. Co.*, 418 F.2d 387, certiorari denied, 397 U.S. 910 8

United States v. *American Trucking Ass'ns.*, 310 U.S. 534 10

United States v. *Fruit Growers Express Co.*, 279 U.S. 363 9

United States v. *Southern R. Co.*, 364 F.2d 86, ceriotiorari denied, 386 U.S. 1031 8

Venner v. *Michigan Central R. Co.*, 271 U.S. 127 8

Statutes and regulation:

Interstate Commerce Act, 24 Stat. 379, as amended, 49 U.S.C. 1 *et seq*:

Section 1(3)(a) 9
Section 1(4) 9
Section 1(14)(b) ..... 2, 3, 5, 6, 7 , 9, 10
Section 16(12) 6

Pub. L. 93-584, 88 Stat. 1917 8

28 U.S.C. 1253 8

28 U.S.C. 1292(a)(1) 6

28 U.S.C. 1336 5

28 U.S.C. 1336(b) 5

28 U.S.C. 1336(c) 5

28 U.S.C. 2325 ..... 2, 7, 8

49 C.F.R. 1032.1 9

Miscellaneous:

45th Annual Report to the Congress (1931) 10

H.R. Rep. No. 2016, 76th Cong., 3d Sess. (1940) 9

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-760

AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY, ET AL., PETITIONERS

v.

PACIFIC FRUIT EXPRESS COMPANY, INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. D-1 to D-12) is reported at 524 F.2d 1025. The opinion of the district court (Pet. App. C-1 to C-17) is reported at 355 F. Supp. 700.

JURISDICTION

The judgment of the court of appeals (Pet. App. B-1) was entered on August 28, 1975. The petition for a writ of certiorari was filed on November 25, 1975. This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

(1) Whether petitioners may properly raise the question of the validity of an Order of the Interstate Commerce Commission in this action for the enforcement of that Order.

(2) Whether Section 1(14)(b) of the Interstate Commerce Act, 49 U.S.C. 1(14)(b), empowers the Commission to require intermediate and terminating railroad carriers to modify and submit for approval the contractual arrangements by which they have been compensating a company that provides them with mechanical protective services.

STATUTES INVOLVED

28 U.S.C. 2325 provided (see n. 4 at p. 8, *infra*):

> An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

Section 1(14)(b) of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U.S.C. 1(14)(b), provides:

> It shall be unlawful for any common carrier by railroad or express company, subject to this chapter, to make or enter into any contract, agreement, or arrangement with any person for the furnishing to or on behalf of such carrier or express company of protective service against heat or cold to property transported or to be transported in interstate or foreign commerce, or for any such carrier or express company to continue after April 1, 1941, as a party to any such contract, agreement, or arrangement unless and until such contract, agreement, or arrangement has been submitted to and approved by the Commission as

just, reasonable, and consistent with the public interest: *Provided,* That if the Commission is unable to make its determination with respect to any such contract, agreement, or arrangement prior to said date, it may extend it to not later than October 1, 1941.

STATEMENT

By order dated October 28, 1958, the Interstate Commerce Commission (the "Commission") instituted an investigation to determine the reasonableness of charges contained in various contracts filed with the Commission governing the use of mechanical refrigeration units for the protection of perishable freight. By supplemental order dated December 9, 1959, the scope of the investigation was broadened to include the justness and reasonableness of all charges for mechanical protective services against heat or cold contained in contracts that required the approval of the Commission pursuant to Section 1(14)(b) of the Interstate Commerce Act, 49 U.S.C. 1(14)(b) (*Contracts for Protective Services,* 318 I.C.C. 111-112; Pet. App. H-2). All of the petitioner railroads were made respondents in that proceeding.

At the time that the proceeding was instituted, all the petitioners were parties to a contractual arrangement referred to as "Division Sheet 7." This established the formula employed by railroad carriers to pay for the use of mechanical protective services furnished by car line companies with whom they did not have a contract setting forth specific charges for such services (*Contracts, supra,* 318 I.C.C. at 114; Pet. App. H-6). All the petitioners then used Division Sheet 7 as the basis for payments for protective services to respondent Pacific Fruit Express Company, one of several such car line companies.

The Commission found that none of the charges for mechanical refrigeration services yielded the costs of rendering such services (*Contracts, supra,* 318 I.C.C. at 123; Pet. App. H-20). Accordingly, the Commission ordered the filing of new or superseding contracts containing certain charge provisions to insure that the companies furnishing protective services would receive not less than the cost of the services rendered (*Contracts, supra,* 318 I.C.C. at 138; Pet. App. H-41). In its Order of August 27, 1962, the Commission specifically provided that new protective service contracts superseding all contracts then on file with the Commission and Division Sheet 7 were to be filed within 120 days. The Order also provided that a person furnishing such services at a loss under the new contracts should bill the railroads on a proportionate basis for its unrecaptured costs (Pet. App. C-5). None of the petitioners complied with that Order.

On December 30, 1965, respondent Pacific Fruit Express Company instituted this action against the petitioners and other non-complying railroads to recover damages allegedly sustained by Pacific Fruit because of the railroads' failure to pay the proportionate share of its losses in providing mechanical protective services, which, under the terms of the contracts mandated by the Commission, they were obligated to pay.

By orders dated November 16, 1971, and January 20, 1972, the district court referred certain questions within the primary jurisdiction of the Commission to that agency for interpretation of its August 27, 1962 Order. The Commission's responses were contained in a declaratory order decided February 28, 1972 (*Contracts-PFE,* 340 I.C.C. 754; Pet. App. E-1 to E-39). The Commission found that Pacific Fruit was supplying protective service for the refrigeration of perishable commodities

within the meaning of Section 1(14)(b) to all railroad carriers participating in the movement of those commodities, regardless of whether the carriers were originating, intermediate or terminating carriers (*Contracts-PFE, supra,* 340 I.C.C. at 766-768; Pet. App. E-25, E-26, E-28). The Commission also found that under its Order, all carriers, including terminating and intermediate carriers such as petitioners, were required to enter into contracts with Pacific Fruit and to submit those contracts to the Commission for its approval (*Contracts-PFE, supra,* 340 I.C.C. at 770; Pet. App. E-31). Under the terms of that Order, those new, required contracts would have superseded Division Sheet 7 (*Contracts-PFE, supra,* 340 I.C.C. at 769; Pet. App. E-30). The Commission further determined that the failure of the intermediate and terminating carriers to enter into new contracts with Pacific Fruit was a violation of Section 1(14)(b) and its 1962 Order (*ibid.*).

Petitioners did not seek to set aside the Commission's declaratory order in the district court; therefore, as the court of appeals found (Pet. App. D-11), under the provisions of 28 U.S.C. 1336(b) and (c), they are now barred from challenging that order (Pet. App. D-11).[1]

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[1]28 U.S.C. 1336 provides in pertinent part:

* * * * *

(b) When a district court or the Court of Claims refers a question or issue to the Interstate Commerce Commission for determination, the court which referred the question or issue shall have exclusive jurisdiction of a civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission arising out of such referral.

(c) Any action brought under subsection (b) of this section shall be filed within 90 days from the date that the order of the Interstate Commerce Commission becomes final.

On April 28, 1972, Pacific Fruit amended its complaint to include a cause of action for a mandatory injunction compelling the defendant railroads to execute contracts with Pacific Fruit of the type required by the Commission in its 1962 Order.[2] On December 11, 1972, the district court granted Pacific Fruit summary judgment on petitioners' liability for damages and granted the joint motion of Pacific Fruit and the Commission for injunctive relief.[3] On March 7, 1973 the court entered its Judgment and Order requiring the defendant railroads to comply with the Commission's Order of August 27, 1962 (Pet. App. F-1 to F-4). On appeal, the court of appeals unanimously affirmed the judgment of the district court (Pet. App. D-1 to D-12).

ARGUMENT

Petitioner railroads challenge (Pet. 13) the authority of the Interstate Commerce Commission to require intermediate and terminating carriers to comply with the provisions of Section 1(14)(b). The question of the validity of the Commission's Order with respect to such carriers was not raised in the courts below and therefore is not properly before this Court. *Lawn* v. *United States*, 355 U.S. 339, 362 n. 16. Furthermore, the validity of the Commission's

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[2]The amended complaint added the Commission and the United States as defendants. The Commission was dismissed as a party defendant by stipulation; on July 21, 1972, it moved to intervene as a plaintiff pursuant to Section 16(12). 24 Stat. 384, as amended, 49 U.S.C. 16(12). Similarly, on September 27, 1972, the United States moved to be realigned as a plaintiff. The district court granted these motions.

[3]The district court did not determine the amount of damages but expressly reserved that issue for later hearings (Pet. App. C-15). The court of appeals had jurisdiction of the appeal under 28 U.S.C. 1292(a)(1).

Order could not have been raised in the district court, since the single-judge district court lacked jurisdiction to set aside an order of the Commission. Finally, petitioners' assertion (Pet. 10) that Section 1(14)(b) does not apply to intermediate or terminating carriers, as distinguished from originating carriers, is erroneous. Section 1(14)(b) gives the Commission plenary authority over protective service arrangements.

1. The instant case began as an action for damages before a single-judge district court, arising out of the failure of petitioners and other railroads to observe the requirements of the Commission's 1962 Order. The complaint was subsequently amended to include a demand for injunctive relief to compel the defendant railroads to observe those requirements in the future. At no time did any party to this action seek to review or set aside the Commission's 1962 Order; petitioners merely contended in the courts below that since they had no contractual arrangement with Pacific Fruit, the 1962 Order did not require them to enter into a superseding contract. Thus, the validity of the application of that Order to intermediate and terminating carriers was not presented to the courts below and is not properly before this Court.

In any event, at the time this action was instituted, an application to set aside any part of an order of the Commission could only have been heard and determined by a three-judge district court pursuant to 28 U.S.C. 2325. See *Aberdeen & Rockfish R. Co.* v. *SCRAP*, 422 U.S. 289, 309-310 n. 12. The single-judge court would have lacked

jurisdiction to consider such a claim,[4] and the court of appeals would have lacked jurisdiction of the appeal under 28 U.S.C. 1253. *Venner* v. *Michigan Central R. Co.*, 271 U.S. 127, 130-131; *B.F. Goodrich Co.* v. *Northwest Industries, Inc.*, 424 F.2d 1349, 1352-1353 (C.A. 3), certiorari denied, 400 U.S. 822. It is settled that the power of the Commission to issue an order cannot be collaterally attacked as a defense to an enforcement action brought before a single-judge district court. *E.g., Tampa Phosphate R. Co.* v. *Seaboard Coast Line R. Co.*, 418 F.2d 387, 398-400 (C.A.5), certiorari denied, 397 U.S. 910; *United States* v. *Southern R. Co.*, 364 F.2d 86 (C.A. 5), certiorari denied 386 U.S. 1031; see *Aberdeen & Rockfish R. Co.* v. *SCRAP, supra*, 422 U.S. at 308 n. 11. Accordingly, petitioners' belated challenge to the validity of the Commission's 1962 Order as applied to intermediate and terminating carriers does not warrant review.

Futhermore, after the district court had granted summary judgment against them in this litigation, several of the petitioning railroads instituted an action challenging the validity of the Commission's 1962 Order before a three-judge district court, where the case has been argued and is now pending decision. *Southern Ry. Co., et al.* v. *United States*, No. 1776-73 (D. D.C.). Thus, the issue that petitioners seek to litigate before this Court is cur-

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[4] 28 U.S.C. 2325 formerly provided:

> An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

This statute was repealed by Pub. L. 93-584, 88 Stat. 1917, which provided that review of Commission orders in actions brought after February 28, 1975, must be sought in the courts of appeals for the various circuits.

rently being litigated in the proper forum, and any rights that petitioners have will be protected adequately in that action.

2. Petitioners suggest (Pet. 15) that Section 1(14)(b) of the Act gives the Commission the power to approve protective service arrangements submitted for its approval, but grants it no corresponding power to compel carriers to enter into such an arrangement where none existed previously. Assuming *arguendo* that this statutory construction is proper, we believe this argument to be irrelevant to this case.

Common carriers by rail are required to provide protective services for perishable goods. See Sections 1(3)(a) and 1(4), 49 U.S.C. 1(3)(a) and (1)(4); *United States* v. *Fruit Growers Express Co.*, 279 U.S. 363. Under the Commission's rules and regulations, 49 C.F.R. 1032.1, any protective services furnished to or on behalf of a railroad must be covered by a written contract (*Contracts-PFE, supra*, 340 I.C.C. at 766-767; Pet. App. E-26). See H.R. Rep. No. 2016, 76th Cong., 3d Sess. 60 (1940). Section 1(14)(b) requires that all such contracts or arrangements must be submitted to and approved by the Commission. At all relevant times, petitioners were parties to Division Sheet 7 (Pet. 10), an arrangement under which they paid and continue to pay compensation for mechanical protective services provided by Pacific Fruit.[5] That arrangement was subject to the requirements of Section 1(14)(b)

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[5]Division Sheet 7 was an agreement among substantially all the nation's railroads which governed the division of revenue collected by the railroads for mechanical protective services under their respective tariffs (Pet. App. D-4). The courts below adopted the Commission's determination that Division Sheet 7 had not been officially filed with it for approval at the time of its August 27, 1962 Order (Pet. Apps. D-8, E-26), although that agreement was specifically embraced in the terms of that Order.

even though it had not been filed properly with the Commission. Under its 1962 Order, the Commission required these carriers to enter into new contracts that would supersede Division Sheet 7 and specified certain prerequisites that had to be included therein before its approval would be given. Thus, petitioners' duty to enter into superseding arrangements arose not only from the 1962 Order, but from the statute itself.

While petitioners assert (Pet. 14) that the power conferred by Section 1(14)(b) is "narrow," the legislative history of the statute supports a broad construction of the Commission's power over protective service contracts or arrangements. Beginning with its 45th Annual Report to the Congress in 1931, the Commission made a series of recommendations that it be given "adequate supervision and control" over protective service arrangements (*id.* at 121). As finally adopted, the language of Section 1(14)(b) is substantially identical to that recommended by the Commission. Soon after enactment of the statute, the Commission required all railroads to file copies of their protective service arrangements with and obtain approval from the Commission. *Contracts for Protective Services*, 246 I.C.C. 145. This contemporaneous construction by the Commission of its power under the statute, which has been followed consistently thereafter, is entitled to great weight. *United States* v. *American Trucking Ass'ns.*, 310 U.S. 534, 549. Thus, as the courts below held (Pet. App. D-9 to D-10), the Commission has the power to review the railroads' protective service arrangements and to remedy violations of the statute by requiring them to enter into

contracts conforming to its orders.[6] Since the action of the Commission was clearly within its power, there is no reason for further review by this Court.

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[6]The cases cited by petitioners for the proposition that the Commission lacks power to "compel" protective service contracts are inapposite, since they turn upon consideration of the congressional intention underlying wholly unrelated provisions of the Act. In *St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.*, 347 U.S. 298, the express congressional denial of power to the Commission to order merger of railroads under 49 U.S.C. 5 was found relevant to its power to order mergers under Section 77 of the Bankruptcy Act. In *Interstate Commerce Commission* v. *Oregon-Washington R. Co.*, 288 U.S. 14, the Court explicated the congressional intention in distinguishing between the Commission's power to compel extensions of existing rail lines under 49 U.S.C. 1(21) and its discretionary power to approve a railroad's proposal to build a new line under 49 U.S.C. 1(18).

Petitioners have not attempted to demonstrate why the legislative histories of those provisions affect the congressional intention underlying the instant statute.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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CERTIORARI DENIED